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CONFLICT OF LAWS AS TO USURY.—The rules governing the conflict of laws as to usury have never been authoritatively settled, partly because the law which is theoretically proper has never been widely recognized, and partly because that law in its practical application, would often be productive of unsatisfactory results. The subject is inherently difficult, and the considerations affecting it are numerous and divergent. Usury itself did not exist at common law,[1] and being in this country the creature of local statutes, the elements of the offence differ greatly in different states.[2] Then it has never been settled as to just how far an intent to extract illegal interest is an essential ingredient of usury.[3] There would seem to be at least four different theories sufficiently established by authority to require recognition, though the cases supporting these rules often differ as to their practical application, and a number of cases exist where the decision was reached without definite adherence to any theory.

[1] Thomas *v.* Clarkson, 125 Ga. 72, 54 S. E. 77, 6 L. R. A. (N. S.) 658.

[2] For example, the laws of Montana and Minnesota as contrasted in the principal case.

[3] Balfour *v.* Davis, 14 Ore. 47, 12 Pac. 89, MINOR, CONFLICT OF LAWS, § 179. The precise limits of this statement are difficult to define. It has been confined by some authorities to mere clerical errors. MINOR, CONFLICT OF LAWS, 430, note 1. But by the majority view, *supra,* it would seem that when the court can choose between two or more laws as the proper law to govern, they will not presume an intent to extract usury; that is, they will choose the law which renders the contract valid.

The first theory, that advanced by Wharton,[4] is that the place of performance of an obligation to pay money is the place where the money is to be used, and the law of that place is the proper law. On principle, since that place is not (except by coincidence) the situs of the making, the performance, or the consideration of the alleged usurious contract, this can hardly be justified. An obligation to repay money, no matter at what interest, is obviously to be performed where the repayment does or should take place, and the place where the money is used has only a very incidental relation to the contract. It is not surprising that Wharton's view has met with little favor at the hands of the courts.

The second view may be briefly considered. It is that the lex loci contractus should govern.[5] As has been pointed out[6] this phrase is too general to admit of practical application, and is confusing in that it involves three distinct elements—the making, the performance, and the consideration, all three of which may have a different situs. This theory also has failed to receive general approval, and is supported only by a small minority of the decisions.

The third view, advocated by Minor,[7] is that usury relates to the consideration, and should be governed by the law of the place where the actual loan or forbearance took place. Upon principle, this would seem to be unquestionably sound.[8] It is evident that the act which the law disapproves is not the mere agreement to advance money, no matter what the rate of interest is, for the agreement may contemplate execution in a state where the transaction is legal. And certainly it is not the agreement to repay, or the actual repayment, by the debtor which is censured. It is the actual advancement of the money by the lender, with the exaction of illegal interest which constitutes the offence. The law of that place should logically be applied. But despite its strict theoretical soundness, this view has met with little direct support from the decided cases, though the actual results reached in perhaps a majority of them are not at variance with it.[9] Several reasons may be advanced for this anomoly. In the first place, this theory takes no account of the usurious intent, or more accurately since that intent is an essential element of the offence,[10] it is presumed to have existed if the contract was usurious. It must be conceded that other instances of presumed intent exist, but these instances, notably in the cases of persons dealing with married women and

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[4] CONFLICT OF LAWS, § 508; Thompson *v.* Edwards, 85 Ind. 414.

[5] 17 HARVARD LAW REVIEW 568, a rather unsatisfactory advocacy of this view, and a sharp criticism of the majority doctrine, based upon the assumption, often erroneously made, that the law applied by the court is really supposed to exist in the minds of the parties.

[6] MINOR, CONFLICT OF LAWS, § 153.

[7] CONFLICT OF LAWS, § 179; Akers *v.* Demond, 103 Mass. 318.

[8] But see the criticism in the L. R. A. note to U. S. Bldg. & Loan Assn. *v.* Beckley, 137 Ala. 119, 33 South. 934, 97 Am. St. Rep. 19, 62 L. R. A. 33.

[9] MINOR, CONFLICT OF LAWS, § 179, p. 433, note 9. See footnote 8, *supra*.

[10] Footnote 3, *supra*.

infants, are distinguishable from that of usury, in that they existed at common law, whereas usury is the creature of statute. In this country these statutes are local to each State and are infinitely variable,[11] and to presume an intent to violate them would be to presuppose a knowledge of them—a supposition sufficiently absurd upon its face, and widely different from a presumption of knowledge of the well-nigh universal disabilities imposed upon infants and *femmes covert*. In the second place, it has not infrequently appeared that the rate of interest was fixed by the borrower, with the deliberate intent of evading all or part of his just debt.[12] Under the inflexible rule that the situs should govern, the lender would be compelled to fall back upon an action for fraud, a remedy of doubtful value Under the majority view, he has ordinarily the infinitely easier task of showing sufficient evidence of the fraudulent intent to enable the court to fix upon a governing law which will give him justice.

The last theory, and that recognized by a great majority of decided cases, is that the parties may choose the law which is to govern, provided there was no intent to evade the usury statutes, and provided also that the law chosen shall also be the law governing one of the important elements of the transaction.[13] This is not in reality so much an application of the law supposed to be in the minds of the parties as an example of the maxim, *ut res valeat, magis quam pereat;* that an honest contract, though in technical violation of the letter of the law, shall be honestly enforced. This theory has met with sharp criticism,[14] and is not in accord with strict principle. But its justification is found in the exceptional nature of usury, and in the substantial justice which it affords to both parties. It has received the qualified approval of the Supreme Court,[15] and the support of the great bulk of decided cases, and whatever may be said of its original wisdom or unwisdom, it seems too firmly established as an exception to the ordinary laws of situs to be disregarded.

This theory was the basis of the decision in *Green* v. *Northwestern Trust Co.* (Minn.), 150 N. W. 229, which, however, seems to have presented some novel features. In that case the R. Co. and G. entered into a contract in Montana for the sale of Montana land. The contract was executed in Montana by the R. Co., sent to Min-

[11] Footnote 2, *supra.*

[12] Miller *v.* Tiffany, 1 Wall. 298; a leading case, and a famous instance of such dealings.

[13] U. S. Bldg. & Loan Assn. *v.* Beckley, *supra;* Bigelow *v.* Burnham, 90 Ia. 300, 57 N. W. 865, 48 Am. St. Rep. 442; 5 R. C. L., CONFLICT OF LAWS, § 60.

[14] 17 HARVARD LAW REVIEW 568.

[15] Miller *v.* Tiffany, *supra;* Cockle *v.* Flack, 93 U. S. 344. The Supreme Court has hitherto confined the parties to a choice between the place where the contract was made, and the place where re-payment was to be made. Nothing more has been required by the cases which have come before them, and it is probable that they will adopt the majority view when the necessity arises.

nesota and there signed by G., and then returned to Montana. This contract was then assigned in Minnesota by G. to the C. Co., a South Dakota corporation, having its principal office and doing business in Minnesota. The R. Co., by its president, made deed in Minnesota to the C. Co., to which deed the seal appears to have been attached in Montana. The C. Co., in Minnesota, made a part payment in cash and the rest in notes, delivered and payable there, but which were forwarded to the R. Co. in Montana. These notes were secured by a mortgage on the land, in the form of a trust deed, which was delivered to the T. Co., a Minnesota corporation, in Minnesota. The notes bore interest at the rate of 6 per cent before, and 8 per cent after, maturity. Such an increase in interest was valid by Montana law, but not by that of Minnesota, but the legal rate in the latter State was 8 per cent or more. The court held, that the interest was not usurious, since the Montana law governed.

This case differs sharply from the ordinary case of usury, for here the notes were issued in payment for land purchased. Usury laws were passed to protect the borrower from the unjust exactions of the lender, from exactions made possible by the necessities of the former. But there is no necessity for a man or a corporation to purchase land, so the reason for the rule ceases to exist. Ordinarily, where land is purchased, and interest-bearing notes are given in payment, the interest may greatly exceed the legal rate, for interest and principle cease to be regarded as such and become simply payment for the land.[16] Under this view, the principal case really involved no question of the conflict of laws or of usury, and the conclusion, though correct, would seem to be based upon an erroneous line of thought, which ignored the simple rule properly applicable. It is to be noted, however, that this principle was never adverted to in the case, which was decided on the ground that the Montana law as to usury properly governed.

THE VALIDITY UNDER THE FOURTEENTH AMENDMENT OF STATE STATUTES REQUIRING RAILROADS TO MAKE A SPECIAL RATE IN FAVOR OF MEMBERS OF A CERTAIN CLASS.—Well within the scope of legislative authority is the power to regulate the rates of common carriers, and when the legislature declares a maximum rate which they may charge, it is presumed reasonable.[1] But although the States have the power to fix a maximum rate, judicial interference is protection against unreasonably low rates. Under the pre-

[16] Beete *v.* Bidgood, 7 B. & C. 453, 7 L. J. K. B. O. S. 35, I. M. & R. 143, 14 E. C. L. 206, 108 Eng. Reprints 792; Parker *v.* Coburn, 10 Allen 82.

[1] Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167; Reagan *v.* Trust Co., 154 U. S. 362; Railroad Co. *v.* Wellman, 143 U. S. 339; Dow *v.* Beidleman, 125 U. S. 680; State ex rel. Missouri, etc., R. Co. *v.* Public Service Co. (Mo.), 168 S. W. 1156.